

US District Court - Delaware
In Re Federal Mogul - Chapter 11

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1 But it's...

2 MR. WYNER: Ms. Simon, this is
3 Richard Wyner from Goodwin Procter. I
4 represent the Center for Claims
5 Resolution.

6 And there is a confidentiality
7 order that has been signed by the parties
8 to this adversary proceeding and by the
9 CCR. And it has been submitted to the
10 judge.

11 I don't believe Travelers is a
12 signatory to that confidentiality
13 agreement; and are you prepared to abide
14 by the terms of that confidentiality
15 agreement with respect to this deposition?

16 MS. SIMON: I just joined this
17 matter, working on this matter at the
18 firm. And I'm not -- I'm not familiar
19 with the confidentiality agreement.

20 What I can do is find out --
21 or get a copy of it, find out whether we
22 are prepared to abide by it -- which I
23 would imagine it would just be not
24 disclosing the information publicly -- and
25 then obtain a transcript of the deposition

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1 if we need it.

2 MR. WYNER: Right.

3 You cannot stay on the call
4 without agreeing to the confidentiality
5 agreement's terms.

6 MS. SIMON: I understand that.

7 MR. WYNER: And so, does that
8 mean you're dropping off the call or
9 you're agreeing to the terms?

10 MS. SIMON: I'll drop off the
11 call for now, because I'm not familiar
12 with the confidentiality agreement.

13 MR. WYNER: Right.

14 I mean, I can tell you that
15 it, you know, is a basic confidentiality
16 agreement that would limit the use of the
17 information generated during this
18 deposition to the proceeding, and prohibit
19 the disclosure to anyone who is not,
20 essentially, a party to the case or
21 retained for purposes of the case.

22 But if you're more comfortable
23 with dropping off, obviously, that is your
24 choice.

25 MS. SIMON: Actually, I guess

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1 it does make sense to not -- to the terms
2 that you just said, to not disclose this
3 material publicly that would otherwise be
4 covered by the confidentiality agreement.

5 MR. WYNER: Okay. Right.

6 So I'm going to assume that
7 you've agreed to those terms, at least as
8 I have described them.

9 I will e-mail you a copy of
10 the confidentiality agreement after the
11 deposition today.

12 MS. SIMON: Thank you.

13 MR. WYNER: And you're at
14 Bingham?

15 MS. SIMON: Yes.

16 MR. FRIEDMAN: And what is
17 your phone number, please?

18 MS. SIMON: (860) 240-2835.

19 MR. FRIEDMAN: Could you read
20 back the last question, please -- and
21 answer.

22 (Whereupon, at this time the
23 referred-to portion of the record was read
24 by the reporter.)

25 BY MR. FRIEDMAN:

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1 Q Mr. Hanlon, if you recall, would
2 plaintiffs typically name a single member of the
3 CCR, or did they more often name multiple
4 members of the CCR in their complaints?

5 A It varied case to case, but it was
6 not uncommon for more than one member to be sued
7 in a particular case.

8 Q If multiple members of the CCR were
9 sued, but not all were named, did CCR assume
10 responsibility for the defense for only those
11 members that were named or did it, in settlement
12 negotiations, attempt to seek settlement on
13 behalf of all members of the CCR?

14 MR. FINCH: Object to form.

15 A Yeah, I think you asked two
16 different questions there; but let me try and
17 answer it.

18 The Center basically defended
19 the cases that were filed. So if companies were
20 sued, they were defended by the Center. If they
21 weren't sued, there was no need to defend them.

22 And it only entered
23 appearances on behalf of the companies -- or had
24 its counsel enter appearances on behalf of the
25 companies that were sued.

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1 With respect to settlement,
2 however, under the terms of the producer
3 agreement the Center did obtain, in every case
4 that it settled, a release of all of the Center
5 members, whether they were named as defendants
6 in the particular case or not.

7 Q Do you know if CCR had a database
8 which tracked the number of times individual
9 member companies were named as defendants in
10 lawsuits?

11 A Yes, certainly.

12 Q So that would show whether some
13 defendants were named more frequently than other
14 defendants?

15 A Yes.

16 Q But the number of settlements for
17 all companies would be the same; is that
18 correct?

19 MR. FINCH: Object to form.

20 A If you are counting releases, yes.

21 Q So when CCR settled cases on behalf
22 of all members -- when it arrived at a
23 settlement number, it would then allocate
24 liability shares among the individual members;
25 is that correct?

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1 A The Center didn't arrive at a
2 number. It negotiated a settlement.

3 Q Okay. When it negotiated a
4 settlement, would it then allocate the total sum
5 of the settlement to its members pursuant to the
6 producer agreement?

7 A Yes.

8 Q Okay. And you referred to before
9 that "Attachment A" to the producer agreement
10 described the allocation methodology?

11 A Yes.

12 Q And that's on page -22 of the
13 document I gave you; is that correct?

14 A Of this particular version --
15 actually, it doesn't say page "22." It says
16 page 1.

17 Q I'm sorry. Does yours not say at
18 the bottom "CCRFM" --

19 A Oh, "CCR-22" -- I'm sorry.

20 Yeah.

21 Q Okay. And that's the allocation
22 methodology that you were describing?

23 A Yes. As it says right at the
24 beginning of "Attachment A":

25 "All Liability Payments,

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1 Allocated Expenses, and Unallocated Expenses
2 shall be apportioned among Participating
3 Producers based on the individual Participating
4 Producer shares established as provided in this
5 Section..."

6 And then there was a Section A
7 that talked about the initial producer shares.

8 And then subsequently there's
9 a Section B, I believe, which describes the
10 process by which those initial shares were
11 subject to adjustment.

12 Q So for the initial allocations under
13 Section A, those allocations were based on a
14 number of occupational groupings -- is that
15 correct? -- at least in part, on the
16 occupational grouping of claimants?

17 A At least in part.

18 Q And the other factors were the
19 historical costs per closed claim for members of
20 the CCR; is that correct?

21 MR. FINCH: Object to form.

22 A I'm not sure I can accept that
23 simple a --

24 Q Well, can you describe for me the
25 method by which allocation in Section A was

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1 reached for individual members of the CCR?

2 MR. FINCH: At what point in
3 time?

4 MR. FRIEDMAN: Well, it's my
5 understanding that Attachment A is as of
6 the date of 1991.

7 BY MR. FRIEDMAN:

8 Q And Attachment B would deal with
9 adjustments to that -- to the initial numbers;
10 is that correct?

11 A As I said in the beginning, the
12 producer agreement was amended from time to
13 time.

14 You have handed me a version
15 that shows the producer agreement itself was
16 amended as of February 1, 1994. But this
17 Attachment A was amended effective December 1,
18 1991.

19 And there was a very
20 substantial amendment to Attachment A, effective
21 December 1, 1991, which effectively adjusted the
22 sharing formula from a generic sharing formula,
23 as it was then known, in which every member
24 basically had a share allocated to it in every
25 case, whether it was named as a defendant in the

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1 case or not -- to what became known as a "named
2 only" sharing formula, where in most situations
3 the sharing formula worked to allocate a share
4 to a company only in the cases in which it was
5 named, and not to companies that were not named
6 as defendants in the case.

7 So if you're asking me to
8 describe the way it worked under this 1991
9 Attachment A, it would be a different
10 explanation than if you were asking me to give
11 you the explanation with respect to Attachment A
12 as of 1988.

13 Q So the 1991 version -- which is the
14 version you have in front of it -- you refer to
15 as having a "named only" provision; is that
16 correct?

17 A It creates a "named only" sharing
18 arrangement for most cases. That's what I said.

19 Q Okay. And "named only" means
20 that -- well, can you describe what "named only"
21 means?

22 A As I said, under the "named only"
23 sharing arrangement, a company was only
24 allocated to share in the cases in which it was
25 named as a defendant and was not allocated to

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1 share in cases in which it was not named as a
2 defendant.

3 Q Did CCR sometimes settle claims,
4 where -- before a plaintiff had actually named
5 any specific defendants, but rather had retained
6 law firms -- but not actually filed a complaint
7 yet?

8 A Would you repeat that question.

9 Q Did CCR settle claims sometimes,
10 where someone had not yet -- with plaintiffs who
11 had not yet initiated complaints, but had
12 retained attorneys?

13 A Well, I think on occasion it did,
14 but -- but, rarely.

15 Q Okay. So in essence, all or almost
16 all of settlements were with plaintiffs who had
17 actually filed claims against at least one
18 member defendant?

19 A Yes; in most cases that was
20 certainly the case.

21 There was a complaint on file,
22 and individual members were either named and/or
23 served as defendants in the case.

24 Q So if a defendant was not -- an
25 individual member was not named as a defendant,

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1 it would not make a contribution to a specific
2 settlement?

3 A It would not be allocated a share by
4 the CCR of the settlement payment -- yes.

5 Q Okay. Were there other changes
6 between the 19- -- substantial changes between
7 the 1988 allocation formula and the 1991
8 allocation formula?

9 A I do not believe there were any
10 changes to Attachment A between October 1988 and
11 December 1, 1991.

12 Q Okay. And what changes besides the
13 one you described before were there in the 1991
14 settlement -- I'm sorry, allocation
15 methodology -- from what had occurred previously
16 or had been set forth previously?

17 A I think that was the fundamental
18 change that occurred.

19 I don't recall any other
20 particular changes occurring to Attachment A at
21 the time -- although, it's more than a decade
22 ago. So I could be forgetting something.

23 Q Can you describe the other -- the
24 components of an individual member's liability
25 share that the CCR used to allocate liability?

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1 A I'm not sure I can. I'm not sure
2 what you mean by the "components" of the share.

3 Q Well, how did you determine how to
4 allocate to an individual CCR member what their
5 percentage of a particular settlement would be?

6 A Well, I didn't do the allocation.

7 Q Um-hum. Okay. How did CCR do that?

8 A Pursuant to the -- Attachment A.

9 Q Can you generally describe it for
10 me?

11 A I can try. But as you can see, it's
12 a pretty complicated document.

13 As I recall, basically what
14 Attachment A did was to provide that claims
15 would be classified according to occupational
16 categories.

17 And then those occupational
18 categories would be grouped into four basic
19 occupational groupings, which are listed on
20 page 2 of Attachment A as: shipyard, insulator,
21 construction, and all others.

22 For each of those occupational
23 groupings, each of the CCR members would be
24 assigned an average cost per closed claim or
25 what became known as a "named only" occupational

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1 average.

2 Q Okay.

3 A And those "named only" averages or
4 average cost per closed claim numbers were based
5 on historical settlements entered into by each
6 member before that member became a member of the
7 ACF.

8 But, those were averages that
9 were subject to adjustment through the share
10 adjustment process that is set out in Attachment
11 A.

12 But basically, in any
13 particular case, the "named only" share
14 allocation was based on each member's "named
15 only" average in that occupational category.

16 And in a particular case, the
17 shares were based on the simple math of taking
18 the "named only" averages for each of the
19 members named as a defendant in the settled
20 claim.

21 And for each member, their
22 share was their "named only" average over the
23 sum of the "named only" averages for all of the
24 members in the case.

25 Q Section B of that document permits

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1 the future adjustment for participating producer
2 shares; is that correct?

3 A Yes.

4 Q Were some adjustments made when
5 additional members joined the CCR after December
6 of 1991?

7 A I don't believe any additional
8 members joined the CCR after December 1, 1991.

9 Q Okay. So Section B's intent and
10 purpose was to provide for the possibility of
11 adjustments made among and between different
12 members of the -- among the existing members of
13 the CCR; is that correct?

14 A I'm not sure what you mean by
15 "among" the members.

16 It provided a process by which
17 the members, themselves, could adjust the shares
18 that were initially agreed to in Attachment A.
19 And it set out that process.

20 And basically, it called for a
21 recommendation by us, as special counsel, which
22 was a nonbinding recommendation with respect to
23 adjustments that were made -- adjustment
24 recommendations that could be made by us, as
25 special counsel, or by individual members.

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1 And then there was a voting
2 procedure, which is set out here.
3 And I don't recall it
4 specifically. But basically, it required, as
5 set forth in B(2)(a), that an adjustment, to
6 become effective, required an affirmative vote
7 of producers representing at least 50 percent of
8 the combined dollar contributions by all
9 producers to the Center for all purposes during
10 the preceding calendar year, and at least 40
11 percent of the number of producers per capita.

12 Q Were there frequently adjustments
13 over the course of the life of the CCR?

14 A There were a significant number.
15 I don't know about
16 "frequently" -- but, you know, something, I
17 think -- I think we had 40, 50 different share
18 recommendations that were voted on over the life
19 of the Center, or something like that.

20 Q Do you recall whether there were
21 adjustments to T&N's share under Section B?

22 A I'm sure there were.
23 I mean, in some cases what
24 were adjusted were the "named only" occupational
25 averages.

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1 And any adjustment in any
2 member's average would affect the averages -- I
3 mean, the settlement averages of all the
4 members.

5 So, you know, it was a zero
6 sum gain.

7 You had to get 100 percent
8 shares. So if you increased one or decreased
9 one, it had some impact on the rest of the
10 members.

11 Q What would the basis be for making
12 adjustments to the claim?

13 A Well, the basic standard was that
14 adjustments should only be made to achieve a
15 sharing arrangement that would more fairly
16 reflect the relative liability of the members in
17 the claim subject to that particular share.

18 So our standard, both in
19 making recommendations for share adjustments or
20 in opining on recommendations that were made by
21 other members, was whether the proposed shares
22 would more fairly reflect relative liability
23 than the existing shares for the liability
24 subject to those shares.

25 Q Did CCR use -- well, was the data

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1 CCR collected used to determine -- used to
2 assist in the determination of whether liability
3 shares were accurately being reflected by the
4 allocation shares?

5 MR. FINCH: Object to form.

6 A Yes. I believe the data the Center
7 collected was used to assist in the
8 share-adjustment process.

9 Q The data collection is -- it looks
10 like it's laid out on page 15 of this agreement,
11 starting on page 15, Subsection (b).

12 And so --

13 A Page 15 of Attachment A, yes.

14 Q Yes. CCRFM -36.

15 So the CCR collected data, all
16 of the type of data in Section (c); is that
17 correct?

18 I'm sorry, Section (b).

19 A I haven't looked at it in a while;
20 but it certainly did track the filing date of
21 the claim; the occupational category of the
22 claim, based on the occupation of the person
23 whose exposure gave rise to the claim; the
24 disease category; dates of exposure.

25 I don't believe the database

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1 necessarily tracked the circumstances of
2 exposure, but the Center did have information
3 with respect to the circumstances of exposure.

4 It certainly tracked who was
5 named as a defendant or a third-party defendant.

6 It certainly tracked
7 plaintiffs' counsel; disposition date; type of
8 disposition; if there was a judgment, which
9 producers were held liable; the amounts paid or
10 owed by the Center's liability payments; and
11 additional other types of information.

12 So, yes, basically that's
13 correct.

14 Q What kind of other information, if
15 you recall, would be collected?

16 A Well, there was no particular
17 limitation on the sort of information that could
18 be deemed relevant.

19 It had to do with the evidence
20 that gave rise to the claims of liability.

21 And in basic terms, our focus
22 was on the strength of the product
23 identification as to each particular member and
24 the nature of the claim against each particular
25 member.

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1 In addition to the information
2 that was provided in the complaint and through
3 discovery in the case, we would from time to
4 time, as special counsel, meet with and
5 interview the liaison counsel that were actually
6 defending the claim and the Center claims
7 analysts who were responsible for negotiating
8 settlements on behalf of the members, to -- and
9 the individual members themselves -- to get
10 their views on the strength or weakness of
11 particular claims against each member, based on
12 occupation, based on product identification,
13 based on any other factor that was relevant to
14 the case.

15 Q Was the potential for plaintiffs to
16 recover punitive damages against a particular
17 defendant part of the strength of a case?

18 A I don't think so.

19 I mean, we focused on the
20 product identification issues and the causation
21 issues.

22 We did not give any particular
23 weight to punitive damages in our share of
24 adjustment recommendations.

25 Q Were punitive damages an issue that

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1 mostly individual counsel would deal with for a
2 specific member?

3 A I'm not sure I understand the
4 question.

5 Q Well, I'll strike the question.
6 I'll move on to a different section.

7 And this information that was
8 collected was reported after the individual
9 members on a monthly basis; is that correct?

10 A Not all of the information I was
11 discussing, no.

12 Q But most of the data gathered under
13 Section B would be reported after the members?

14 MR. FINCH: Object to form.
15 Mischaracterized what he said.

16 A The Center routinely reported
17 certain claims information to the members.

18 I don't know what particular
19 information you're referring to. We'd have to
20 go through it bit by bit.

21 And I don't recall whether it
22 was reported monthly or quarterly or on some
23 other basis.

24 But certainly -- you know,
25 certain kinds of claims data were routinely

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1 reported to the members.

2 Q Did that include number of claims
3 against specific defendants -- let's say, on a
4 monthly basis?

5 A My recollection is that -- I don't
6 know whether it was monthly or not -- but my
7 recollection is that the members certainly did
8 receive information about the number of new
9 claims that were reported as to each member.

10 But I do not believe that the
11 Center routinely provided to the membership
12 information about the individual number of
13 claims asserted against another member.

14 My recollection is that,
15 generally, each member was told the total number
16 of claims that it was named in and, I think,
17 what percentage that was of the total number of
18 claims brought against all members.

19 Q Well, do you know what kind of
20 information about other members was provided to
21 each member individually in order for them to
22 determine whether or not an allocation share of
23 the specific member was appropriate or not?

24 A Yes, I have some knowledge of it.

25 Q Can you tell me what knowledge that

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1 would have been?

2 A Well, it varied over time.

3 In the early years, each
4 member's share was treated by each of the
5 members as confidential.

6 I think that was a holdover
7 from the Asbestos Claims Facility days, where
8 the shares were considered confidential.

9 But over time as members began
10 to appreciate the share-adjustment process and
11 realized that it was a zero sum gain, there was
12 focus on the facts with respect to other
13 members, in order that the members could make a
14 judgment as to the adjustment process, because
15 they couldn't really make that on a "before"
16 basis without having some information about the
17 case.

18 In the early adjustments, the
19 adjustments tended to focus on discrete groups
20 of claims that were broken out into what were
21 called in the producer agreement "special claim
22 categories."

23 And with respect to those
24 special claim categories, we would carve them
25 out of the traditional occupational grouping

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1 that they would otherwise be placed into.

2 And they would be subject to
3 an ad hoc or a special sharing arrangement just
4 for those claims.

5 And with respect to those
6 claims, we would often share with the members a
7 great deal of information with respect to the
8 facts pertaining to those particular claims.

9 Generally, they arose out of a
10 particular job site or were brought by a
11 particular plaintiff or were filed in a
12 particular region of the country.

13 And we would share all kinds
14 of information with respect to the strength or
15 weaknesses of those claims against each of the
16 members that were named in those claims.

17 And over time, that process
18 continued.

19 And I worry about simplifying
20 the process by trying to shorthand it into a few
21 sentences.

22 But, from time to time there
23 were adjustments to the occupational averages
24 for shipyard, insulator, all other, or the
25 construction categories.

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1 And that would involve a much
2 more global assessment of the relative strength
3 and weakness of the claims against a member, as
4 compared to the other members in each of those
5 occupational groupings.

6 And information with respect
7 to the strength or weakness of claims in those
8 particular categories were shared by us with the
9 members as part of the share-adjustment process.

10 And they all -- the members
11 were also free to seek information from the
12 claim staff or liaison counsel or from the other
13 members, with respect to those matters.

14 Q On page -39, CCR Bates stamp -39 --
15 it looks like page 18 of Attachment A -- it
16 lists -- under Section 4 there begins a list of
17 factors about -- that would help, I guess --
18 help the CCR staff identify whether there might
19 be a basis for adjustments to particular
20 members' shares.

21 Is that a fair
22 characterization of what that section is
23 intended to do?

24 A No, I don't think so.

25 First of all, the staff had no

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1 role in adjusting or setting the producer
2 shares.

3 Q Did they make recommendations?

4 A No. The adjustment recommendations
5 generally came from individual members
6 themselves or from Shea & Gardner as special
7 counsel.

8 Q Okay.

9 A The staff's job was to defend and
10 settle the claims.

11 But as established by the
12 producer agreement, they did not take any role
13 in the share-adjustment process, apart from
14 providing information to the members or to
15 special counsel.

16 As it says there, the Center
17 and special counsel would monitor the reports
18 and information obtained to identify any factors
19 or trends that tended to suggest that the
20 existing shares may not fairly reflect the
21 relative responsibility of producers for
22 settlement payments or defense costs.

23 The factors that are then
24 listed were among the factors that were looked
25 at, but they were only the listed factors. They

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US District Court - Delaware
In Re Federal Mogul - Chapter 11

June 1, 2005
William Hanlon, Esquire

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1 did not limit the factors.

2 And we were free, as special
3 counsel, and the members were free as members,
4 to look at any other factors that they thought
5 were relevant to the question of whether the
6 existing shares did or did not fairly reflect
7 the relative responsibility of the members, or
8 whether they should be adjusted to more fairly
9 reflect the relative responsibility of the
10 members for a particular group of claims, either
11 for a particular occupational grouping or for a
12 particular special claim category.

13 Q In Section (g) on page 19, it
14 discusses that: "Disposition or other data
15 indicating for a particular category of
16 claims..." -- and then there is language that
17 the relative responsibility among participating
18 producers is significantly different from what
19 is indicated by the participating producer
20 share?

21 A Yeah.

22 Q Would that be based on the kind of
23 information you were talking about, that -- a
24 determination that might, in fact, be the
25 case -- that there was a -- the relative

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